APPEAL NO. 020772
FILED MAY 9, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 13, 2002. The hearing officer resolved the disputed issues by deciding that the employer did not tender a bona fide offer of employment to the respondent (claimant) and that the claimant had disability from January 27, 2001, through June 18, 2001. The appellant (carrier) appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

BONA FIDE OFFER OF EMPLOYMENT ISSUE

The hearing officer found that the employer's written offer of light-duty work failed to meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) entitled "Bona Fide Offers of Employment." The carrier does not contend that the offer met the requirements of Rule 129.6, rather, the carrier contends that Rule 129.6 goes beyond the requirements of Section 408.103(e) and is therefore invalid per the decision in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). In Rodriguez, the court held that the 90-day period for disputing an initial impairment rating that was contained in Rule 130.5(e) had no exceptions and that the Texas Workers' Compensation Commission's (Commission) Appeals Panel could not create ad hoc exceptions to that rule. The Rodriguez decision does not support the carrier's argument that Rule 129.6 is invalid.

The Appeals Panel has previously held that it has no authority to decide the validity of Commission rules. In response to a challenge to the validity of another rule, the Appeals Panel stated as follows in Texas Workers' Compensation Commission Appeal No. 010160, decided March 8, 2001:

> The carrier contends that Rule 133.206(k) "is invalid to the extent that it conflicts with Labor Code Section 413.031." The Appeals Panel has previously held that it does not have authority to decide the validity of Commission rules. Texas Workers' Compensation Commission Appeal No. 980427, decided April 15, 1998. Texas Workers' Compensation Commission Appeal No. 980673, decided May 18, 1998, noted that administrative rules are presumed to be valid, that the burden of proving invalidity is on the party asserting invalidity, and that the courts are the proper forum for deciding the validity of agency rules.

With regard to how the offer of employment failed to meet the requirements of Rule 129.6, we note that under the particular facts of this case, where the initial treating doctor

had not issued a Work Status Report (TWCC-73) and did not indicate disagreement with the restrictions identified by the doctor who examined the claimant upon a referral from a doctor recommended by the employer, those restrictions being the basis of the job offer that was made about a month before the claimant changed treating doctors, the hearing officer was mistaken in writing that the offer was not bona fide because the work restrictions were not established by the treating doctor. This is so because Rule 129.6(b) provides, in part, that, "[i]n the absence of a Work Status Report by the treating doctor an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor." *See* Texas Workers' Compensation Commission Appeal No. 020436, decided April 17, 2002, which applied the referenced provision.

However, because, as noted by the hearing officer, the offer of employment did not meet all of the requirements of Rule 129.6(c), the hearing officer's determination that a bona fide offer of employment was not made is affirmable. Rule 129.6(h) provides, in part, that "[t]he Commission will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of this section." For example, the offer did not contain the schedule the employee would be working or a statement that "the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary." *See* Rule 129.6(c)(2) and (5). In Texas Workers' Compensation Commission Appeal No. 012088, decided October 17, 2001, the Appeals Panel stated:

> The Appeals Panel, mindful of the admonition in the case of Rodriguez [*supra*], has held that all of the elements set forth in Rule 129.6(c) must be present for the offer to be considered a BFOE [bona fide offer of employment]. Texas Workers' Compensation Commission Appeal No. 011878-S, decided September 28, 2001; Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001.

DISABILITY ISSUE

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." It is undisputed that the claimant sustained a compensable back injury. Conflicting evidence was presented on the disability issue. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Roy L. Warren
Appeals Judge